

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0402

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT HOUGHTON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

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STATEMENT OF THE ISSUE

Did the district court properly deny Houghton's motion to dismiss for lack of a speedy trial?

STATEMENT OF THE CASE

On August 21, 2007, the State filed an Information charging Robert Lee Houghton (Houghton) with two counts of Sexual Assault, Sexual Intercourse Without Consent, and Incest. (D.C. Doc. 3.) Houghton's victims were his stepdaughter, D.J.H, and her friend, D.M.H. (D.C. Doc. 1.) Houghton was arrested on December 11, 2007. (D.C. Doc. 4.)

On December 5, 2008, Houghton filed a motion to dismiss the charges for lack of a speedy trial. (D.C. Doc. 50.) The State opposed the motion. (D.C. Doc. 53.) After holding a hearing on January 15, 2009, the district court issued its findings of fact, conclusions of law and order denying Houghton's motion to dismiss. (D.C. Doc. 69.)

On March 26, 2009, pursuant to a plea agreement, Houghton pled guilty to Incest and one count of Sexual Assault, and the court dismissed the remaining offenses. (D.C. Doc. 75.) Houghton reserved the right to appeal the district court's order denying his speedy trial motion. Id. On May 6, 2009, the district court sentenced Houghton to 20 years in prison with 10 years suspended for the

offense of Sexual Assault, and 20 years in prison with 10 years suspended for the offense Incest. The district court ordered the sentences to run concurrently.

(D.C. Doc. 83.)

STATEMENT OF FACTS RELATED TO MOTION TO DISMISS

Since Houghton pled guilty to Incest and Sexual Assault, the underlying facts of the offenses are set forth in the affidavit in support of the Information.

(D.C. Doc. 1.) The facts relevant for this appeal are those related to Houghton's speedy trial claim.

On March 9, 2007, Bozeman Police Department Sergeant Bandon Olson informed Detective Sergeant David McManis of a report from D.M.H.'s mother that Houghton had touched D.M.H. and her friend and Houghton's stepdaughter, D.J.H., in an inappropriate manner. The next day, McManis conducted a forensic interview of both girls. (1/15/09 Tr. at 49-50.) After interviewing the girls, McManis attempted to find and arrest Houghton. (1/15/09 Tr. at 51, 53.) McManis went to Houghton's residence, and his wife, T.H., told McManis that Houghton had left in the night. T.H. did not know where Houghton had gone. (1/15/09 Tr. at 51-52.)

In attempt to find Houghton, McManis broadcasted an attempt to locate Houghton. The broadcast included Houghton's name, his personal description and

his vehicle information. (1/15/09 Tr. at 51.) Through a motel receipt found by Houghton's boss in Houghton's company truck, McManis later determined that Houghton had stayed in Livingston. (1/15/09 Tr. at 52-53.)

Houghton abruptly left his job. He never told his boss he was leaving or where he was going. His boss had to go to Houghton's residence to retrieve the company truck. Houghton kept the company's cell phone. His boss unsuccessfully tried contacting Houghton on the cell phone. (1/15/09 Tr. at 52-53.)

In mid-April, T.H. contacted McManis and told him that she had communicated with Houghton. Houghton had told T.H. that he had a night shift job. T.H., however, did not know where Houghton was living. McManis asked T.H. to call him if she found out Houghton's location. (1/15/09 Tr. at 56, 60.)

On August 21, 2007, the State filed charges against Houghton and an arrest warrant was issued for Houghton. (D.C. Docs. 3, 4.) McManis entered the warrant into the National Criminal Information Center (NCIC). (1/15/09 Tr. at 59.)

According to Houghton, after the allegations were raised, he and T.H. decided that she would stay in their apartment. Houghton explained that he had nowhere else to go, so he went to live with his father in Portland, Oregon. Houghton claimed that T.H. knew where he was living. (1/15/09 Tr. at 8, 11-12.) Houghton said he had no idea that the police were involved, and that T.H. had told him that she was not going to involve the police. (1/15/09 Tr. at 8-9.) Houghton admitted that he

never told his employer that he was quitting and moving out of town. Houghton acknowledged that he “just up and left.” (1/15/09 Tr. at 13.) Houghton stated that after he left Montana he lived with his father for three or four months, then got his own apartment. (1/15/09 Tr. at 14.)

On October 15 and 16, 2007, Houghton had a texting conversation with T.H. in which they discussed D.J.H.’s allegation that Houghton had D.J.H. touch him. (1/15/09 Tr. at 14-17; State’s Ex. 1.) Houghton acknowledged that D.J.H.’s allegation of sexual contact with Houghton was a serious issue. (1/15/09 Tr. at 15-17; State’s Ex. 1.) Houghton claimed that T.H. never told him anything about law enforcement’s involvement in the matter, and it never crossed his mind that law enforcement was involved. (1/15/09 Tr. at 17-18.)

Houghton testified that he did not learn of the arrest warrant for him until around Thanksgiving of 2007, when he randomly found it online while conducting an internet genealogy search. (1/15/09 Tr. at 9, 18-19.) On December 10, 2007, Houghton returned to Montana and turned himself in. (1/15/09 Tr. at 9.)

On December 17, 2007, Houghton made his initial appearance and pled not guilty to the charged offenses. The district court set Houghton’s bail at \$100,000 and scheduled an Omnibus hearing for January 23, 2008. (D.C. Doc. 7.) On January 3, 2008, the State provided Houghton with full discovery of the documents in the prosecution’s file. (D.C. Docs. 10, 11.)

At the January 23, 2008 Omnibus hearing, Houghton's counsel moved to continue the hearing, and the State did not object. The district court granted the continuance. (D.C. Doc. 14.) The district court held a second Omnibus hearing on February 27, 2008. Houghton's counsel again moved to continue the hearing, the State did not object, and the district court granted the continuance. (D.C. Doc. 16.) The district court held a third Omnibus hearing on March 28, 2008. Houghton's counsel again moved to continue the hearing. The State did not object to the motion, but did request that Houghton file a waiver of speedy trial with the court. The district court granted Houghton's continuance. (D.C. Doc. 17.) There is no record of a waiver in the district court file.

On April 23, 2008, the district court held a fourth Omnibus hearing. Although the district court minutes do not specifically indicate Houghton moved for a continuance, the district court continued the Omnibus hearing to May 22, 2008. The State again requested that Houghton file a waiver of speedy trial. (D.C. Doc. 21.)

At the fifth Omnibus hearing, on May 22, 2008, Houghton's counsel requested another continuance, and over the State's objection, the district court continued the Omnibus hearing to June 25, 2008. The State again requested that Houghton file a waiver of speedy trial. (D.C. Doc. 23.) At the sixth Omnibus hearing on June 25, 2008, Houghton's counsel requested another postponement, and the district court granted the request, continuing the Omnibus hearing to July 30,

2008. The State did not object to the continuance, but did request that Houghton file a waiver of speedy trial. (D.C. Doc. 24.) Finally, at the seventh Omnibus hearing, the parties discussed pretrial matters, culminating with the district court setting a three-day trial starting on January 21, 2009. (D.C. Docs. 25, 26.)

Houghton's criminal investigator, Rick West, interviewed the victims and their parents on July 15, 2008. During the interviews, West became aware of the need to obtain the additional medical and counseling records of the victims, as well as the Department of Public Health and Human Services (DPHHS) file. (1/15/09 Tr. at 25-26, 27-32.) On August 15, 2008, Houghton filed a motion for discovery, requesting that the district court order the State to provide: (1) D.J.H.'s medical records and counseling records; (2) D.M.H.'s counseling records; and (3) the DPHHS file. (D.C. Doc. 27.)

The requested discovery documents were not part of the State's file nor were they reviewed by the prosecutor. (D.C. Doc. 29.) The State, however, did not resist Houghton's discovery request. Id. The State informed the district court that it would ask the victim to execute a release so it could obtain the relevant medical records and it would obtain the DPHHS file. The State provided that it would forward the records and documents to Houghton. Id.

In response to Houghton's request for D.J.H.'s and D.M.H.'s counseling records, the State explained that Montana law limits the disclosure of confidential

information between mental health professionals and their clients. Id., citing Mont. Code Ann. § 26-1-807, and State v. Reynolds, 243 Mont. 1, 8, 792 P.2d 1111, 1115 (1990). Citing State v. Donnelly, 244 Mont. 371, 376, 798 P.2d 89, 92 (1990), overruled on other grounds by State v. Imlay, 249 Mont. 82, 91, 813 P.2d 979 (1991), the State proposed that the district court conduct an in camera review of the counseling records to determine if they contain exculpatory information, and if so, provide that information to Houghton. Id.

On October 28, 2008, the district court ordered the State to provide Houghton with D.J.H.'s medical records and the DPHHS file by November 21, 2008. (D.C. Doc. 31.) The district court ordered the State to provide it with the counseling records by November 21, 2008, for in camera inspection. Id. On November 19, 2008, the State provided Houghton the additional ordered discovery material and the district court with the counseling records. (D.C. Docs. 40, 41, 42.) On January 8, 2009, the district court found that the counseling records did not contain any exculpatory information. (D.C. Doc. 58.)

On December 5, 2008, Houghton filed a motion to dismiss the charges for lack of a speedy trial. (D.C. Doc. 50.) On January 15, 2009, the district court conducted a speedy trial hearing. Afterwards, the district court balanced and explained each of the four speedy trial factors articulated in State v. Ariegwe,

2007 MT 204, 338 Mont. 442, 167 P.3d 815, and denied Houghton's motion to dismiss. (D.C. Doc. 69.)

Regarding the length of delay in this case, the district court found that there were 520 days from the filing of the Information on August 21, 2007, to Houghton's January 21, 2009 trial date. The district court concluded further analysis under the speedy trial factors was necessary because the 200-day trigger day established by Ariegwe was met. (D.C. Doc. 69 at 4-5.) The district court further stated:

The delay in bringing Mr. Houghton to trial is more than "twice the amount of delay that is considered sufficiently prejudicial to trigger the speedy trial test." Ariegwe, ¶ 123. As a result, "the State must provide compelling justifications for the delay under Factor Two; and under Factor Four, the State must make a highly persuasive showing that [Mr. Houghton] was not prejudiced by the delay, while the quantum of proof that may be expected of [Mr. Houghton] under this factor is correspondingly lower." Id.

Id. at 5.

Under factor two, the district court divided the delay into four time periods. The district court found that the first period of delay between the filing of the Information on August 21, 2007, to Houghton's initial appearance on December 17, 2007, amounted to 119 days. Id. at 5-6. The district court noted the State contended that Houghton was responsible for the delay because it was caused when he fled after the victims reported Houghton's sexual assaults. Id. The

district court rejected Houghton's claim that he had not absconded, finding him responsible for the delay. The district court explained:

It is highly unlikely that the precise match in the date of Mr. Houghton's departure from Montana—March 10, 2007—with the date his alleged victims reported his alleged sexual assaults upon them is a mere coincidence. Mr. Houghton's failure to notify his employer that he was leaving his job at the time is further persuasive evidence of flight. Thus, based on the testimony of Det. McManis and Mr. Houghton, this Court concludes that Mr. Houghton absconded. Accordingly, this first period of delay is attributable to Mr. Houghton, for which his culpability is great given the intentional cause of the delay. See State v. West, 2008 MT 338, ¶¶ 34-35 (whether conduct of the defendant frustrated service of arrest warrant, such as by absconding from jurisdiction, is one factor addressed in determining whether due process was satisfied, i.e., whether the State executed the arrest warrant and brought the defendant before the court without unreasonable delay).

Id. at 6.

The district court found the second period of delay ran from the initial appearance on December 17, 2007, until the first Omnibus hearing on January 23, 2008. Id. The district court noted that the State had conceded that the 38 days of delay should be charged to the State as institutional delay, but observed that institutional delay should be weighed less heavily against the State than intentional delay. Id., citing Ariegwe, ¶ 113.

The district court found that the third period of delay ran from the first Omnibus hearing on January 23, 2008, until the seventh Omnibus hearing on July 30, 2008, which was when the January 21, 2009 trial date was set. The court found

that this period of delay amounted to 190 days. Id. at 7. The district court noted that Houghton claimed his counsel was forced to continue the Omnibus hearings because the State had not produced the requested discovery. The district court explained that Houghton characterized the requested discovery as “exculpatory.” On the other hand, the district court noted the State contended that Houghton could have taken measures to obtain the information that was not within its possession, and that the State had no obligation to conduct an investigation for him. Id.¹

The district court held that while the State must not interfere with a defendant’s right to obtain exculpatory evidence, the State is not required to take the initiative or even assist the defendant in procuring exculpatory evidence. Id. at 7-8, citing State v. Saxton, 2003 MT 105, ¶ 32, 315 Mont. 315, 68 P3d 721. The district court found that Houghton failed to provide any authority to support his claim that the State was required to procure the so called exculpatory evidence for him. Id. at 8. The court also found that Houghton did not “reference any factual support for his contention that his counsel was forced to continue the Omnibus Hearings because of the State’s failure to produce discovery.” Id. The court stated that the court minutes reflect that each Omnibus hearing was continued upon the

¹ The State maintained that as D.J.H.’s stepfather, Houghton could have obtained the DPHHS file regarding D.J.H. pursuant to Mont. Code Ann. § 41-3-205(3)(d). The State also maintained Houghton could have subpoenaed the medical records pursuant to Mont. Code Ann. § 46-15-106. (D.C. Doc. 65 at 7.)

request of Houghton's counsel, without explanation about the need for the continuances. Id.

The district court emphasized that Houghton's investigator, Rick West, had testified that the additional discovery documents did not come to light until the witness interviews in July 2008. Id. at 8. The district court then stated:

"Therefore, Mr. Houghton's position that the delay from January 2008 through July 2008 is attributable to the State's failure to produce full discovery is inconsistent with the fact that Mr. Houghton was not even aware such additional discovery was necessary to obtain until July 2008." The district court concluded Houghton had failed to prove that his six requests for a continuance were based on the State's failure to provide additional discovery. Id.

The district court further noted Houghton waited until August 15, 2008, to file his discovery motion, more than two weeks after the district court set the January 21, 2009 trial date. Id. The district court observed that if Houghton had "truly wanted a speedy trial, he could have filed a motion to compel discovery sooner, rather than waiting approximately seven (7) months after his counsel moved to continue the first scheduled Omnibus Hearing." Id. at 8-9. The court observed that the situation would have been different if the State had entirely failed to produce any discovery, thereby forcing Houghton to request the continuances of the Omnibus hearings. The district court explained that did not occur here because Houghton received discovery

from the State on January 3, 2008, several weeks before the first scheduled Omnibus hearing. Id. at 9. The district court concluded that Houghton was responsible for all of the 190 days during the third period of delay.

The district court explained that the fourth period of delay of 176 days, ran from the July 30, 2008 Omnibus hearing, in which the district court set the trial date, to the January 21, 2009 trial date. The district court agreed with the State's concession that the delay was attributable to the State as institutional delay, finding that it was due to the court's overcrowded docket. Id.

The district court found that factor two weighed against Houghton, stating:

In sum, Mr. Houghton is responsible for 309 days of pretrial delay, whereas the State is responsible for 214 days of institutional delay. Therefore, even though there is a long stretch past the 200 day threshold, Mr. Houghton is responsible for over half of the overall delay. Consequently, Factor Two weighs against the conclusion that Mr. Houghton was deprived of his right to a speedy trial.

Id. at 9-10.

The district court weighed the third factor, the accused's response to the delay, against Houghton. Id. at 9-10. The district court explained:

Here, Mr. Houghton's speedy trial argument was filed on December 5, 2008, the 473rd day of the delay. The trial date of [January]² 21, 2009 had been set for over four months. Mr. Houghton and his counsel made no earlier request or evidenced persistence in seeking to have the trial set at an earlier date. Moreover, Mr. Houghton contended that he repeatedly moved to continue the Omnibus Hearings because of incomplete discovery. However, he did

² The district court in its order mistakenly stated "July" instead of "January."

not move the Court for the State's production of additional discovery until August 15, 2008. Mr. Houghton could have moved the Court sooner for the additional discovery, and he also could have objected on speedy trial grounds sooner. Additionally, Mr. Houghton has been represented by counsel, a fact that weighs in the State's favor.

Similar to the situation in Ariegwe, the record in this case bears an absence of any objections by Mr. Houghton to the pre-trial delay (aside from the recently-filed pending motion) and thus makes it difficult for him to prove he was denied a speedy trial. Id., ¶ 82. Paired with Mr. Houghton's delay in moving this Court for the additional discovery, Mr. Houghton's behavior indicates that he truly did not want a speedy trial. See id., ¶¶ 81-84.

Id. at 10-11.

Under the fourth factor, prejudice to the accused, the district court considered and balanced three considerations. Regarding the first consideration, oppressive pretrial incarceration, the district court found that Houghton's absconding from Montana to Oregon led to his pretrial incarceration. Id. at 12. Emphasizing Houghton's flight and the seriousness of the charges, the court further stated:

Here, in light of the serious allegations against Mr. Houghton, and the factual finding that he absconded, high bail and pretrial incarceration were necessary in order to prevent Mr. Houghton from fleeing. Therefore, Mr. Houghton's own culpability in fleeing and creating the delay in service of the warrant must be considered, despite the lengthy pretrial incarceration in his case.

Id. at 13.

The district court rejected Houghton's claim that he suffered anxiety and concern as a result of the delay, stating:

Mr. Houghton contends he has been prejudiced by experiencing public scorn, by losing employment and being unable to save money for the future, and by having his associations curtailed. He failed to present any evidence, however, of any press coverage or public recognition of Mr. Houghton's case in the local community. Furthermore, Mr. Houghton's flight from the jurisdiction necessitated his pretrial incarceration, resulting in his inability to work and curtailed associations. Separately, there is no evidence that Mr. Houghton's inability to work has been a source of economic hardship on his family members, contrary to a situation where an incarcerated defendant is the sole breadwinner for his family. To the contrary, Mr. Houghton is now divorced from his ex-wife Although Mr. Houghton generally contends that there has been a "severe limitation of associations and relationships outside of the detention center," and testified as such at the hearing, he fails to identify such relationships and references no family members with whom he has had no contact since incarceration.

Id. at 13-14.

The district court next found that there was a presumption of impairment of the defense due to the 520 days of total delay and the pretrial incarceration which the district court called "oppressive." The district court reiterated that Houghton was partly responsible for the delay here. Id. at 14-15.

The district court concluded that the State failed to make a "highly persuasive showing" that Houghton was not prejudiced by the delay. Even though the district court found that Houghton was responsible for some of the prejudicial impact because he created much of the delay, the district court concluded that the State's showing did not outweigh the presumption of prejudice under factor one.

Id. at 15.

Finally, in balancing all four of the speedy trial factors, the district court found that factor one, the length of delay, weighed in favor of Houghton. Id. The district court found that factor two, the reasons for delay, weighed in favor of the State and against the conclusion that Houghton was deprived of his right to a speedy trial. The district court stated that Houghton was responsible for 309 days of pretrial delay, whereas the State was responsible for 214 days of institutional delay. Id. The district court found that factor three, the accused's response to the delay, weighed heavily in the State's favor and minimized the weight in favor of Houghton under factors one and four. The court explained that Houghton's behavior indicated that he truly did not want a speedy trial. Id. Regarding factor four, the district court found that the State did not make a highly persuasive showing of no prejudice as result of the oppressive pretrial incarceration and the State's showing did not outweigh the presumption of prejudice under factor one. Id. at 16.

After balancing all of the factors, the district court concluded that Houghton had not been denied his right to a speedy trial. Id.

SUMMARY OF THE ARGUMENT

The four speedy trial factors demonstrate Houghton was not denied a speedy trial. The district court correctly recognized that the first factor, length of delay, weighed in favor of Houghton.

As for factor two, the reasons for the delay, the district court correctly weighed this factor in favor of the State and against Houghton. Of the 519 days of delay, Houghton was responsible for 307 days and the State was responsible for 212 days, all of which was institutional delay. Houghton's absconding from Montana to Oregon and his six continuances of the Omnibus hearing were the cause of the 307 days of delay.

For the first time on appeal, Houghton argues that all of the delay was caused in part by the State's and district court's negligence and lack of due diligence in setting an earlier date. Since Houghton never raised this argument in the district court, this Court should decline to consider it on appeal. Moreover, Houghton's argument overlooks the fact that the district court's ability to set an earlier trial date was hindered by his repeated requests to continue the Omnibus hearing.

Houghton also suggests that the State's failure to provide complete discovery caused him to request six continuances of the Omnibus hearing and the delay of the trial date. As the district court correctly found, the State's alleged failure to provide Houghton with discovery did not cause Houghton to continue the Omnibus hearing six times.

Regarding Houghton's responses to the delay, the district court correctly found that Houghton's behavior indicated that he truly did not want a speedy trial. The district court properly weighed the third factor heavily in favor of the State,

and correctly stated that factor three minimized the weight in favor of Houghton under factors one and four.

Finally, regarding the fourth speedy trial factor of prejudice, the State disagrees with the district court's assessment that the State did not make a highly persuasive showing of no prejudice. The district court's assessment appears to be based on the faulty assumption that Houghton's defense was impaired simply because of the delay and his pretrial incarceration.

Nonetheless, the district court's ultimate conclusion that Houghton was not denied his right to a speedy trial is correct.

ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED HOUGHTON'S MOTION TO DISMISS FOR LACK OF A SPEEDY TRIAL.

A. Standard of Review

This Court reviews factual findings underlying a district court's speedy trial ruling to determine whether they are clearly erroneous. Ariegwe, ¶ 119. A district court's findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake was made. "[W]hether the defendant has been denied a speedy trial--i.e., whether the factual circumstances, when evaluated pursuant to

the four-factor balancing test, amount to a speedy trial violation--is a question of constitutional law.” Id. This Court reviews de novo a district court’s legal conclusions to determine whether it correctly interpreted and applied the law. Id.

B. The Four Speedy Trial Factors

When considering a speedy trial claim, the court balances the following four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the accused’s responses to the delay; and (4) prejudice to the accused. Ariegwe, ¶¶ 106-112.

1. The Length of the Delay

a. The interval between the accusation and trial

The speedy trial clock started when the State filed the Information on August 21, 2007. Ariegwe, ¶ 42. Houghton’s trial was scheduled to begin on January 21, 2009. The interval between the Information and the scheduled trial date was 519 days.³ The 200-day trigger date to conduct a further speedy trial analysis was met in this case. Id., ¶ 41.

b. The extent to which the delay stretches beyond the 200-day trigger date

Since there were 319 days of delay beyond the 200-day trigger date, the district court found that factor one weighed in favor of Houghton. (D.C. Doc. 69 at

³ The district court incorrectly calculated the total delay at 520 days. The district court also made other slight calculation errors in each of the four periods of delay. The district court’s errors have no effect on the overall speedy trial analysis. In its argument, the State will provide the correct number of days of delay.

15.) The district court noted that under Ariegwe, ¶ 123, the State must provide compelling justifications for the delay under factor two, and under factor four the State must make a highly persuasive showing that Houghton was not prejudiced by the delay. Id. at 5.

2. Reasons for the Delay

Under the second factor, the court identifies each period of delay, attributes the delay to the State or the accused, and assigns weight to the delay based on the reasons for the delay. Ariegwe, ¶ 108. Institutional delay and delay for valid reasons weighs less heavily against the State than delay caused by the State's bad faith or lack of diligence. Id. As this Court has explained: "Institutional delay is delay that is inherent in the justice system and largely beyond the control of the justice system." State v. Rose, 2009 MT 4, ¶ 57, 348 Mont. 291, 202 P.3d 749. "The more delay caused by the State for 'unacceptable' reasons (e.g., lack of diligence or bad-faith delay), the more likely the accused's speedy trial right has been violated." Ariegwe, ¶ 109.

Here, the district court analyzed the delay under four specific time periods. Rather than following the district court's analysis, Houghton adopts a lump sum approach, claiming there is only one 520 day period of delay and the State is responsible for the entire amount. (Appellant's Br. at 11.) Houghton maintains the State's is responsible for the delay because of the State's and the district court's

negligence and lack of due diligence in setting an earlier trial date. Additionally, Houghton maintains that the State's failure to provide timely discovery also caused the delay.

This Court should decline to adopt Houghton's lump-sum approach when analyzing the periods of delay in this case. Such an analysis ignores the fact that Ariegwe requires the court to identify each specific period of delay and then to attribute the delay to the responsible party. Ariegwe, ¶¶ 63-66, 113. Moreover, Houghton's lump-sum approach glosses over his responsibility for specific periods of delay. For example, Houghton ignores the fact that he was responsible for the first 118-day period of delay because he absconded from the State after the victims reported his sexual assaults.

Rather than adopt the lump-sum approach advocated by Houghton, this Court should follow the course taken by the district court and mandated by Ariegwe, and review the delay under the four specific time periods. The State will address Houghton's argument concerning the State's alleged failure to provide discovery and the State's and district court's alleged failure to properly set an earlier trial date under the third period of delay.

a. The 118-day delay from the filing of the Information to Houghton's initial appearance

The first period of delay from the filing of the Information on August 21, 2007, to Houghton's initial appearance on December 17, 2007, amounted to 118

days. The district court found the delay was caused by Houghton absconding from Montana after the victims reported his sexual assaults. The district court correctly concluded that Houghton intentionally caused the delay. (D.C. Doc. 69 at 5-6.)

This Court has stated that when an “accused is outside of Montana’s jurisdiction, ‘the State must act diligently and in good faith to acquire jurisdiction.’” State v. Lacey, 2010 MT 6, ¶ 17, 355 Mont. 31, ___ P.3d ___, citing State v. Longhorn, 2002 MT 135, ¶ 22, 310 Mont. 172, 49 P.3d 48 overruled on other grounds by Giambra v. Kelsey, 2007 MT 158, 338 Mont. 19, 162 P.3d 134. However, if the accused avoids being brought to trial, some or all responsibility for the delay should be attributed to the accused. Lacey, ¶ 18. Accordingly, the proper analysis requires addressing not only the reasons for the delay as they pertain to the accused’s actions, but also whether the delay can be attributed to the State for failing to act diligently and in good faith to acquire jurisdiction. Id.

As the district court correctly recognized, Houghton avoided being brought to trial when he fled from Montana after the victims reported his sexual assaults. His flight from Montana caused the 118-day period of delay. With only limited information regarding Houghton’s whereabouts, the State made a good faith effort to locate him. On March 10, 2007, McManis interviewed both girls regarding the sexual assaults. Additionally, on March 10, 2007, after the interviews, McManis

attempted to locate and arrest Houghton at his residence. Houghton's wife, T.H., told McManis that Houghton had left in the night and she did not know where he had gone. (1/15/09 Tr. at 51-52.) McManis had dispatch broadcast an attempt to locate on Houghton, which included Houghton's name, his personal description and his vehicle information. (1/15/09 Tr. at 51.) In an attempt to garner a lead on Houghton's whereabouts, McManis also contacted Houghton's boss. He learned that Houghton never told his boss he was leaving or where he was going, and Houghton just up and left his job. (1/15/09 Tr. at 52-53.)

In mid-April, T.H. contacted McManis to tell him that Houghton had talked to her. Houghton had told T.H. that he had a night shift job. T.H., however, did not know where Houghton was living. McManis asked T.H. to call him if she found out where Houghton was located. (1/15/09 Tr. at 56, 90.) T.H.'s contact with Houghton provided no clue as to his whereabouts or where to begin to search for him.

After the State filed the charges against Houghton on August 21, 2007, an arrest warrant was issued for Houghton. In an effort to find Houghton, McManis entered the warrant in to the NCIC data base. (1/15/09 Tr. at 59.)

The State made a good faith effort to locate Houghton. Houghton, on the other hand, absconded from Montana to avoid facing the sexual assault allegations. The district court correctly attributed the 118-day period of delay to Houghton.

On appeal, Houghton offers no serious argument to support a claim that the State failed to act in good faith to locate him or that he did not abscond from Montana. (Appellant's Br. at 10-13.) Accordingly, this Court too should attribute the 118-days of delay to Houghton. In the district court, Houghton argued that the State did not diligently attempt to locate him. (D.C. Docs. 68 at 5-6; 55 at 2-3; 50 at 4-5.) Houghton claimed that his wife T.H. knew he was in Oregon, and since she was listed as a witness for the State, the police should have been able to locate him. Houghton also denied that he absconded from Montana. (D.C. Docs. 68 at 5; 55 at 2.)

The district court rejected Houghton's claim that he had not absconded. (D.C. Doc. 69 at 6.) The court's finding that Houghton had absconded is not clearly erroneous. As the district court correctly recognized, it is highly unlikely that it is mere coincidence that Houghton's departure from Montana occurred on the same date the victims reported the sexual assaults. (D.C. Doc. 69 at 6.) Moreover, as the district court also correctly noted, "Houghton's failure to notify his employer that he was leaving his job at that time is further persuasive evidence of flight." Id.

Houghton's claim that the State failed to act diligently in locating him because T.H. allegedly knew his whereabouts is not compelling. McManis talked to T.H. in mid-April after Houghton contacted her. McManis asked T.H. if she

knew where Houghton was, and she did not know. McManis asked T.H. to call him if she found out where Houghton was located. If Houghton actually told T.H. he was in Oregon, the State cannot be faulted for T.H.'s decision not to relay Houghton's whereabouts to McManis.

Houghton was responsible for the first 118 days of delay.

b. The delay from Houghton's December 17, 2007 initial appearance to the first scheduled Omnibus hearing on January 23, 2008

The second period of delay, from Houghton's December 17, 2007 initial appearance to the first scheduled Omnibus hearing on January 23, 2008, amounted to 37 days. The district court correctly found that this delay was institutional delay. (D.C. Doc. 69 at 6.) As this Court explained: "institutional delay is delay that is inherent in the judicial system and largely beyond the control of the justice system." Rose, ¶ 57. The district court properly attributed the institutional delay to the State, and correctly noted that it should be weighed less heavily against the State than intentional delay. (D.C. Doc. 69 at 6, citing Ariegwe, ¶ 113.)

c. The delay from the first scheduled Omnibus hearing on January 23, 2008 to the seventh scheduled Omnibus hearing on July 30, 2008

The third period of delay from the first scheduled Omnibus hearing on January 23, 2008, to the seventh scheduled Omnibus hearing on July 30, 2008, in

which the Court set the trial for January 21, 2009, amounted to 189 days of delay. The district court properly found that Houghton was responsible for all of this delay. (D.C. Doc. 69 at 9.)

Houghton argues that the delay is attributable to the State because it was caused in part by the State's and district court's alleged lack of due diligence and negligence in setting a trial date. Houghton absolves himself of any blame for the January 21, 2009 trial date. Additionally, Houghton claims the State was responsible for the delay because it failed to provide him with discovery of D.J.H.'s medical records and counseling records, D.M.H.'s counseling records, and the DPHHS file. He suggests the State's failure to provide discovery led to the numerous continuations of the Omnibus hearing and the delay of the trial date.

In the district court proceedings, Houghton never argued that the delay was caused by the State's and the district court's failure to set an earlier trial date. See D.C. Doc. 50 (Mot. to Dismiss and Br. in Support); D.C. Doc. 55 (Reply); D.C. Doc. 68 (Def.'s Prop. Finds. & Concls.). Houghton only argued the delay was caused by the State's failure to provide discovery. See D.C. Doc. 50 at 5-6; D.C. Doc. 55 at 1-2; D.C. Doc. 68 at 5. Houghton maintained that he was forced to continue the Omnibus hearings because the State failed to produce the requested discovery. See D.C. Doc. 50 at 5-6. As this Court has stated, “[a] party may not raise new arguments or change its legal theory on appeal because it is

fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider.”” State v. Hendershot, 2009 MT 292, ¶ 31, 352 Mont. 271, 216 P.3d 754 (citations omitted). Since Houghton’s argument that the delay was caused by the State’s and the district court’s lack of due diligence and negligence in setting a trial is an argument raised for the first time on appeal, this Court should decline to consider it. Id.; see also State v. Pollack, 1998 MT 105, ¶ 12, 288 Mont. 436, 958 P.2d 75.

Even if this Court considers Houghton’s new argument on appeal, his argument overlooks the fact that the State’s and the district court’s ability to set an earlier trial date were hindered by his repeated requests to continue the Omnibus hearings. Montana Code Annotated § 46-13-110(2) provides that the purpose of the Omnibus hearing is to expedite the procedures leading up to the trial. At the Omnibus hearing, the parties discuss pretrial matters, such as double jeopardy, the existence of a possible plea agreement, disclosure and discovery motions, the defendant’s reliance on certain defenses, notice of seeking persistent felony offender status, notice of other crimes, wrongs or acts, suppression motions, motions to dismiss, motions for change of place of trial, and stipulations by the parties. Mont. Code Ann. § 46-13-110(3). A discussion of these pretrial matters at the Omnibus hearing allows the district court and parties to discuss and set a trial date, a date in which both parties will realistically be ready for trial.

In this case, the district court's regular procedure is to set a trial date at the Omnibus hearing. Houghton moved to continue the Omnibus hearing six times. After Houghton's sixth continuance of the Omnibus hearing, the district court held an Omnibus hearing on July 30, 2008, and set the trial for January 21, 2009. Houghton's repeated requests to continue the Omnibus hearing not only prevented a discussion of the pretrial matters, but it prevented the district court from setting a realistic trial date. The district court properly attributed the delay to Houghton.

The district court record refutes Houghton's claim that the State is responsible for the delay during this time period because the State failed to provide him discovery. On January 3, 2008, the State provided Houghton with full discovery of the documents in the prosecutor's file. (D.C. Docs. 10, 11.) Houghton's criminal investigator, Rick West, conducted witness interviews on July 15, 2008. During the interviews, West became aware of the need to obtain additional medical and counseling records of the victims, as well as the DPHHS file. On August 15, 2008, Houghton filed a motion for discovery, requesting the State to provide: D.J.H.'s medical and counseling records; D.M.H.'s counseling records; and the DPPHS file. (D.C. Doc. 27.) The district court found that Houghton had characterized the requested discovery as exculpatory. (D.C. Doc. 69 at 7.)

The requested documents were not part of the prosecutor's file, nor were they reviewed by the prosecutor. (D.C. Doc. 29.) The State did not resist Houghton's discovery motion. Id. The State informed the district court that it would ask the victim to execute a release of her medical records and then it would forward the medical records along with the DPHHS file to Houghton. Id. The State proposed that the district court should conduct an in camera review of the counseling records to determine if they contained any exculpatory information, and if so, provide the information to Houghton. Id. On October 28, 2008, the district court ordered the State to provide Houghton with D.J.H.'s medical records and the DPHHS file by November 21, 2008. The district court also ordered the State to provide it with the counseling records by November 21, 2008, so it could conduct an in camera inspection. (D.C. Doc. 31.) The State provided Houghton with the additional ordered discovery material on November 19, 2008, and on the same day, the State provided the district court with the girls' counseling records for the in camera review. (D.C. Docs. 40, 41, 42.) On January 8, 2009, the district court found the counseling records contained no exculpatory information and did not provide Houghton with any of the records. (D.C. Doc. 58.)

Since Houghton first became aware of the need to review the victims' medical and counseling records and the DPHHS file after his investigator's July 15, 2008 interviews, and Houghton first filed his motion for discovery on

August 15, 2008, the State's alleged failure to provide "full" discovery could not have caused Houghton's continuances of the January 23, February 27, March 28, April 23, May 22, and June 25, 2008 Omnibus hearings because Houghton was not aware of the need for additional discovery when he moved for the continuances. Moreover, as the district court correctly found, there is no factual support in the record to support Houghton's contention that he was forced to continue the Omnibus hearings because of the State's failure to produce discovery. (D.C. Doc. 69 at 8.) The district court correctly concluded that Houghton failed to prove that his six continuances of the Omnibus hearing were based on the State's failure to provide additional discovery. Id.

The district court noted that Houghton characterized his requested discovery as exculpatory. As the district court explained, while a defendant has a constitutional right to obtain exculpatory evidence, the State is not required to take the initiative or even assist the defendant with procuring exculpatory evidence. (D.C. Doc. 69 at 7-8, citing Saxton, ¶ 32.) The district court correctly found that Houghton "failed to provide any authority for his proposition that the State was required to procure this 'exculpatory' evidence for him." (D.C. Doc. 69 at 8.)

Even if the State had a duty to acquire and produce the medical and counseling records, as well as the DPHHS file, the State's failure to initially do so

did not cause the continuances of the Omnibus hearings and the delay in setting the trial date because Houghton first made his discovery request on August 15, 2008, which was after the district court had already granted Houghton's six continuances of the Omnibus hearing and after the district court had set the January 21, 2009 trial date. In addition, the State's providing the medical records and DPHHS file to Houghton on November 19, 2008, should play no role in the speedy trial analysis because it did not affect or postpone the January 21, 2009 trial date. Ariegwe, ¶ 63. The district court correctly attributed the third period of delay to Houghton.

d. The delay from the July 30, 2008 Omnibus hearing to the January 21, 2009 trial date

The fourth period of delay from the July 30, 2008 Omnibus hearing to the January 21, 2009 trial date, amounted to 175 days of delay. The district court found that the delay was due to the district court's overcrowded docket. (D.C. Doc. 69 at 8.) The district court correctly attributed the delay to the State as institutional delay. State v. Billman, 2008 MT 326, ¶ 20, 346 Mont. 118, 194 P.3d 55 (stating "crowded dockets and difficulties in setting trial dates often cause institutional delays"). The institutional delay here weighs less heavily against the State than delay resulting from the State's lack of diligence or bad faith. Id., citing Ariegwe, ¶ 108.

In summary, Houghton was responsible for 307 days of delay and the State was responsible 212 days of delay, all of which was institutional delay. The

district court correctly found that factor two weighed against the conclusion that Houghton was deprived of his right to a speedy trial. (D.C. Doc. 69 at 10.)

3. The Accused's Response to the Delay

The evaluations of Houghton's response to the delay must be based on surrounding circumstances. Ariegwe, ¶ 85; accord Rose, ¶ 60. Those circumstances include things such as timeliness, persistence and sincerity of any objection to the delay, reasons for the acquiescence in delay, whether the accused had counsel, and his pretrial conduct (as that conduct bears on the speedy trial). Ariegwe, ¶ 85; Rose, ¶ 60. Conduct expressing a desire to be brought to trial promptly weighs in Houghton's favor whereas conduct demonstrating a desire to avoid trial weighs against Houghton in the overall balancing. Rose, ¶ 60; citing Ariegwe, ¶ 85. In addition, as this Court observed, "Factor Three serves an important role in the balancing test by providing insight into whether the accused actually wanted a speedy trial and what weights the court should assign to the other three factors in the analysis." Ariegwe, ¶ 79.

Here, the district court correctly found that Houghton's behavior indicated that he truly did not want a speedy trial. The district court weighed the third factor in favor of the State. (D.C. Doc. 69 at 10.) The district court noted Houghton was represented by counsel. The district court emphasized Houghton's lack of timeliness

in asserting his right to a speedy trial, explaining that the trial date had been set for four months before Houghton raised his speedy trial claim. Id. at 10-11.

The district court noted that Houghton and his counsel made no earlier request or evidenced persistence in seeking to have the trial set at an earlier date. Id. The district court further noted that “Houghton had contended that he repeatedly moved to continue the Omnibus Hearings because of incomplete discovery.” Id. at 10. The district court recognized the inherent weakness in Houghton’s contention, when it observed that Houghton did not move the district court for the State’s production of additional discovery until August 15, 2008. Id. As previously explained, the State’s alleged failure to provide Houghton with complete discovery could not have caused Houghton to continue the six Omnibus hearings between January 23, 2008 to June 25, 2008, because Houghton first became aware of his need for additional discovery when his investigator conducted witness interviews on July 15, 2008, and he first made his motion for additional discovery on August 15, 2008.

Finally, after the January 15, 2009 speedy trial hearing, on January 16, 2009, Houghton moved to continue the January 21, 2009 trial date, and the district court granted his request. (D.C. Doc. 70.) The fact that Houghton requested a continuance of his trial date one day after his speedy trial hearing also indicates that he was not really interested in a speedy trial.

4. Prejudice to the Accused

Under the fourth factor, the Court must examine whether the delay prejudiced the accused in light of the interests that the speedy trial right protects: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that pretrial delay will impair the accused's defense. Billman, ¶ 36; Ariegwe, ¶¶ 86-100. There is a presumption the delay prejudices the accused when the speedy trial analysis is triggered, and the presumption increases as the delay increases. Billman, ¶ 36; Ariegwe, ¶ 56.

a. Oppressive pretrial incarceration

When determining whether the pretrial incarceration is oppressive, this Court considers the duration of the incarceration, the complexity of the charged offenses, whether the accused engaged in any misconduct related to the pretrial incarceration, and the conditions of the incarceration. Billman, ¶ 38; Ariegwe, ¶ 92. An instance of misconduct related to the pretrial incarceration is if the accused has demonstrated a likelihood to flee the jurisdiction of the court. Ariegwe, ¶ 92, citing State v. Keyes, 2000 MT 337, ¶ 18, 303 Mont. 147, 15 P.3d 443 (“As to any prejudicial effects of Keyes’ lengthy pretrial incarceration, there can be no doubt in this case that a high bail and resulting incarceration were necessary in light of . . . his demonstrated ability and willingness to abscond from justice.”).

In this case, Houghton’s bail was set at \$100,000, and he was incarcerated because he was unable to post bail. The district court correctly recognized any oppressive pretrial incarceration is offset by the seriousness of the offenses and the fact that Houghton’s own misconduct led to his pretrial incarceration. (D.C. Doc. 69 at 13-14.) As the district court explained:

Here, in light of the serious allegations against Mr. Houghton, and the factual finding that he absconded, high bail and pretrial incarceration were necessary in order to prevent Mr. Houghton from fleeing. Therefore, Mr. Houghton’s own culpability in fleeing and creating the delay in service of the warrant must be considered, despite the lengthy pretrial incarceration in his case.

Id. at 13.

b. The accused’s anxiety and concern

As this Court has stated, “a certain amount of anxiety and concern is inherent in being accused of a crime.” Ariegwe, ¶ 97. The question is whether the delay in bringing Houghton to trial unduly prolonged the disruption of his life or aggravated the anxiety and concern inherent in being accused of Sexual Assault, Sexual Intercourse Without Consent and Incest. Id. Some of the considerations this Court considers when reviewing the issue of aggravated anxiety and concern include: (1) public scorn or obloquy, or damage to reputation in the community; (2) deprivation of employment; (3) drain of financial resources or economic hardship; and (4) curtailment of associations. Id., ¶ 113.

In the district court proceedings, Houghton alleged that he suffered anxiety and concern because he may have experienced public scorn and damage to his reputation, he lost employment, he was unable to save for the future, and his associations were curtailed. (D.C. Doc. 50 at 9.) The district court found Houghton's allegations unsupported by the record. The district court noted that Houghton failed to present any evidence of press coverage or public recognition of his case in the local community. (D.C. Doc. 69 at 14.) Additionally, the district court found that Houghton himself was to blame for his inability to work and curtailed associations. The court explained: "Houghton's flight from the jurisdiction necessitated his pretrial incarceration, resulting in his inability to work and curtailed associations." Id.

Regarding Houghton's lost employment, the district court further observed: "[T]here is no evidence that Mr. Houghton's inability to work has been a source of economic hardship on his family members, contrary to a situation where an incarcerated defendant is the sole breadwinner for his family. To the contrary, Mr. Houghton is now divorced from his ex-wife, [T.H.]." Id.

Finally, regarding Houghton's allegation that he experienced severe limitations of associations and relationships, the district court correctly noted that Houghton failed to identify such relationships and he referenced no family member with whom he had no contact with since his incarceration. Id.

On appeal, Houghton only claims that he “suffered economic hardship as a result of his incarceration” because “he was not able to work for over a year due to his pre-trial incarceration.” (Appellant’s Br. at 17.) As the district court correctly recognized, Houghton’s high bail, his pretrial incarceration and his resulting loss of employment were due to his previously absconding from Montana to Oregon. Houghton has not demonstrated that the delay aggravated the anxiety and concern inherent in being accused of the charged offenses.

c. Impairment of the defense

As this Court has stated, “[l]imiting the possibility that the pretrial delay will impair the accused’s defense arguably is the most important interest that the speedy trial right protects because an accused’s inability to present an effective defense undermines the fairness of the system.” Billman, ¶ 47, citing Ariegwe, ¶ 98.

Both this Court and the United States Supreme Court have recognized that in those cases where there is excessive delay affirmative proof of impairment of the defense is not always necessary in every speedy trial claim. Ariegwe, ¶¶ 99-100; Doggett v. United States, 505 U.S. 647, 655 (1992). In Doggett, in which there was an eight and one-half year lag between Doggett’s indictment and his arrest, the United States Supreme Court stated: “[W]e generally have to recognize that excessive delay presumptively compromises the reliability of trial in ways that neither party can prove or, for that matter, identify. While such presumptive

prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria . . . it is part of the mix of relevant facts, and its importance increases with the length of delay.” Doggett, 505 U.S. at 656 (citations omitted).

Citing Doggett, this Court in Ariegwe stated:

Indeed, “consideration of prejudice is not limited to the specifically demonstrable,” since “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.” Doggett, 505 U.S. at 655, 112 S. Ct. at 2692, 2693. Thus, “affirmative proof of particularized prejudice is not essential to every speedy trial claim.” Doggett, 505 U.S. at 655, 112 S. Ct. at 2692.

Accordingly, in the absence of affirmative proof that the delay has impaired the accused’s ability to present an effective defense, impairment must be assessed based on other factors in the analysis--e.g., the length of the delay (the greater the delay, the greater the erosion of exculpatory evidence and testimony), the accused’s responses to the delay (the more imperiled the accused’s ability to present an effective defense becomes, the more likely he or she is to complain about the delay), and the duration of the pretrial incarceration (an accused who is locked up is hindered in his or her ability to gather evidence, contact witness, or otherwise prepare for his or her defense).

Ariegwe, ¶¶ 99-100.

Here, Houghton’s defense was not impaired by the delay. There is no evidence in the record that his witnesses disappeared, evidence was lost, memories of the witnesses faded, or Houghton was unable to raise specific defenses as a result of the delay. Houghton had a private investigator and counsel to gather evidence and contact witnesses for him.

Despite the lack of any evidence in the record that the delay impaired Houghton's defense, the district court concluded that there was evidence of impairment to the defense because of the length of the delay, and oppressive pretrial incarceration. (D.C. Doc. 69 at 14-15.) The district court's presumption of impairment of the defense based only on the total delay and incarceration without any affirmative evidence of such impairment is incorrect for a number of reasons.

First, the delay has to be **excessive** to render proof of affirmative evidence of impairment of the defense unnecessary. See Doggett, 505 U.S. at 655-56; Ariegwe, ¶¶ 99, 113. In Doggett, the delay was excessive because the delay was eight and one-half years. In comparison, the 519 days of delay in Houghton's case can hardly be considered excessive delay.

Moreover, it is unfair to presume impairment of the defense when Houghton was responsible for 307 of the 519 days of delay, while the State was responsible for only 212 days of institutional delay. To do so would simply reward Houghton for his delay of the trial, and would encourage future defendants to delay trials with repeated continuances.

In Ariegwe, there was a total delay of 408 days. Ariegwe, ¶ 122. This Court in Ariegwe, when discussing the trigger point of when prejudice can be presumed, specifically rejected the notion that prejudice may be presumed without affirmative proof when "the State is responsible--perhaps due to institutional forces beyond the

prosecutor's control--for 275 days of delay.” Ariegwe, ¶ 51. Here, the State was responsible for 212 days of institutional delay. This Court should not presume prejudice without affirmative proof. Id.

In Lacey, where the length of delay was 3,472 days, the defendant admitted that he could show no direct prejudice to his defense, but contended because of the length of the delay and the State's negligence in causing it, the Court should presume prejudice. Lacey, ¶ 24. This Court rejected the defendant's contention, stating:

Under the totality of the circumstances in this case, we agree with the District Court that Lacey's claims of prejudice fail. The primary reasons for the delay, other than the 182 days of institutional delay assigned to the State, were Lacey's actions including his constant movement, failure to file taxes or attend his mother's funeral, and the numerous other reasons discussed in our factor two analysis. This, coupled with the fact that Lacey can show no evidence of direct prejudice to his defense, supports the conclusion that Lacey has failed to show prejudice under factor four of our speedy trial claim analysis.

Id., ¶ 25. Similarly, Houghton's own conduct of absconding and repeatedly continuing the Omnibus hearings, are the primary reasons for the delay in this case and, therefore, this Court should require Houghton to show prejudice to his defense, something he has failed to do.

In addition, the district court incorrectly concluded that Houghton's defense was prejudiced because Houghton's pretrial incarceration was oppressive. As previously explained, Houghton's incarceration was not oppressive. Moreover, Houghton's incarceration did not prejudice his defense because he had a private

investigator and counsel working on his behalf to gather evidence, contact witnesses and prepare his defense.

Considering the subfactors under the fourth speedy trial factor of prejudice, the district court concluded that the State failed to make a highly persuasive showing that Houghton was not prejudiced by the delay. (D.C. Doc. 69 at 15.) The district court's conclusion is incorrect. The pretrial incarceration was not oppressive. Additionally, Houghton has not demonstrated aggravated anxiety or an impaired ability to present an effective defense as a consequence of the delay. This Court should weigh factor four in the State's favor.

5. The Balancing of the Four Speedy Trial Factors

The district court correctly concluded that the length of the delay weighed in favor of Houghton. (D.C. Doc. 69 at 15.) Additionally, the district court correctly weighed factor two in favor of the State. As the district court explained, Houghton was responsible for 307 days of delay, while the State was responsible for 212 days of institutional delay. The district court properly weighed factor three heavily in the State's favor because Houghton's behavior indicated Houghton truly did not want a speedy trial.

The State disagrees with the district court's assessment that the State did not make a highly persuasive showing of no prejudice under factor four. The district court's assessment appears based on its faulty assumption that Houghton's

defense was impaired simply because of the delay and his incarceration.

Nonetheless, the district court's ultimate conclusion that Houghton was not denied his right to a speedy trial is correct and should be affirmed by this Court.

CONCLUSION

Houghton was not denied a speedy trial. This Court should affirm the district court order denying Houghton's motion to dismiss

Respectfully submitted this ____ day of March, 2010.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,959 words, excluding certificate of service and certificate of compliance.

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